

## **Market Price, Social Price, and the Right to the City: Land Taxes and Rates for City Services in Brazil and the United States**

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### ABSTRACT

Brazil's 1988 Constitution and 2001 City Statute explicitly adopt the concept of a right to the city articulated by French philosopher Henri Lefebvre. As residents of Rio de Janeiro's informal self-constructed communities achieve success in their struggle for legalization and citizenship, they are confronted with the high market price of property ownership. Willing to pay for city services according to their ability, they argue for a social price, rather than a market price, for city services, to prevent their inevitable displacement. While Brazil has the legal tools in place, it is unclear whether, and if so how, the idea of a social price will take hold for residents of newly "regularized" settlements. The city and state have responded to the argument for a social price with a variety of measures, hesitating between a true social price and the imperatives of the market. In the United States, cities have grappled, on an informal and largely ad hoc basis, with the social-price issue. A variety of tax abatements, transfers, and utility rate programs exist at the state and municipal government level to address the reality that market pricing of city services will drive the poor out of the city center, where their labor and social communities are either needed or at least tolerated. While the concept of a right to the city, and of social pricing, are foreign to United States law and the neoliberal consensus, the catalog of these programs reveals a certain recognition of an inchoate right to an affordable city, in continual opposition to the rules of the market.

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## I. INTRODUCTION

Many of the poor in Brazil's cities, like those all over Latin America and the global South, have lived for decades in self-constructed housing without legal property rights or recognition. After facing slum clearance and forced relocation programs for much of the twentieth century, slum dwellers have recently achieved some incorporation into the legal city, with its network of city services, and the beginning of a legal recognition of their occupancy through title-granting programs.<sup>2</sup> But on the day the *favela*<sup>3</sup> resident receives her new deed, she is also faced with the bill for her new citizenship. With ownership comes the problem of paying property taxes, utility rates and all the other charges that come with a title deed and an address. Thus does the formalization and legalization process, intended to remedy social exclusion, produce a more ruthless form of exclusion by market pricing of the city.<sup>4</sup> Residents of informal communities yearn for the citizenship that the tax bill represents, but militate also for a social price<sup>5</sup> that recognizes the unequal wages that the urban economy pays them.

Although not identified as such, social pricing for taxes and municipal services, including water and energy rates, exist in various forms in both Brazil and the United States. Various explicit legislative enactments or administrative practices depart from the market logic that market pricing should determine what city residents should pay for city services. These laws and practices seem to have emerged in response to various political mobilizations and from concern of political leaders and administrators to mitigate the harsh triage that pure market pricing imposes on citizens of the city.

After introducing the right to the city and its incorporation into Brazil's legal texts, I will discuss the social pricing practices of Brazilian cities and municipal service providers, and then turn to the corresponding practices in United States cities. While the

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2. EDESIO FERNANDES, REGULARIZATION OF INFORMAL SETTLEMENTS IN LATIN AMERICA (Lincoln Inst. of Land Pol. 2011).

3. *Favela* is the term generally used to identify shantytowns in Rio de Janeiro and in Brazil generally. Ney dos Santos Oliveira, *Favelas and Ghettos: Race and Class in Rio de Janeiro and New York City*, 23 *LATIN AMERICAN PERSPECTIVES* 71 (1996).

4. See *infra* notes 39-41.

5. My thanks to Cláudio Napoleão, community leader and mediator in the Cantagalo community in Rio de Janeiro, who expressed the demand for a social price during a roundtable discussion at Fundação Getúlio Vargas on July 14, 2010.

idea of social rates, explicit in Brazil and implicit in the U.S., has not been identified as a means to promote the right to the city, my contention is that de facto social pricing for local taxes, water and energy are in fact a limited expression of the struggle for participation and against segregation that is captured by Lefebvre's phrase.

## II. CONCEPTIONS OF THE RIGHT TO THE CITY AND BRAZILIAN LAW

The 1988 democratic Brazilian constitution, like many modern constitutions in Latin America and elsewhere,<sup>6</sup> incorporates a range of social and economic rights, and in that context, also adopts a modern view of individual property rights as less than absolute, balanced and limited by the social uses of land.<sup>7</sup> This conception of property rights was a partial victory for the "right to the city" movement, some of whose demands are incorporated in the proposed World Charter on the Right to the City.<sup>8</sup> The movement emerged from the urban social revolts of the 1960s and 1970s, and the anti-globalization groups that came together in the World Social Forum first held in Porto Alegre Brazil in 2001.<sup>9</sup>

New Left French philosopher Henri Lefebvre first elaborated the concept of the right to the city in *Le Droit a La Ville* (1968)<sup>10</sup>,

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6. LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE, (Penelope Andrews & Susan Bazilli, ed. 2010); Carmen G. Gonzalez, *Squatters, Pirates and Entrepreneurs: Is Informality the Solution to the Urban Housing Crisis?*, 40 U. MIAMI INTER-AM. L. REV. 239, 255-56 (2009).

7. The Constitution of Brazil, Article 5, enumerates fundamental individual and collective rights and duties and includes the following references to property rights:

XXII - the right of property is guaranteed;

XXIII - property shall fulfill its social function;

XXIV - the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution. (English translation of Brazil 1988 Constitution with amendments through 1996, <http://pdpa.georgetown.edu/Constitutions/Brazil/english96.html#mozTocId89810>).

8. The Charter was drafted by various NGOs and social movements participating in the 2004 World Social Forum in Barcelona Spain and is available at: <http://www.dpi.org/files/uploads/publications/WorldCharterontheRighttotheCity-October04.doc>. See UN HABITAT, *Bridging the Urban Divide, Right to the City* (2010) [www.unhabitat.org/documents/SOWC10/R12.pdf](http://www.unhabitat.org/documents/SOWC10/R12.pdf); Mark Purcell *Citizenship and the Right to the Global City: Reimagining the Capitalist World Order*, 27 INT'L J. OF URBAN AND REGIONAL RES. 564 (2003).

9. Margit Mayer, *The 'Right to the City' in the Context of Shifting Mottos of Urban Social Movements*, 13 CITY 362 (2009).

10. The only English translation appears in HENRI LEFEBVRE, *WRITINGS ON CITIES* (Eleonore Kofman & Elizabeth Lebas trans. 1996).

and returned to the theme in several later works, through and including *La Production de L'Espace* (1974).<sup>11</sup> Lefebvre conceived the right as directly opposing the right to private property.<sup>12</sup> Where property is the right to exclude and the right to appropriate exchange value, the right to the city includes the right of all citizens to the “use-value” of space for their needs, for housing, for play, for festivals, and, crucially, for social interchange.<sup>13</sup> The right also includes the right to break free from the control of urban spaces exerted by capitalism’s imperatives. For Lefebvre, the right to the city was a continual and revolutionary popular demand.<sup>14</sup> The adoption of Lefebvre’s phrase by the modern anti-globalization movement and urban reformers has arguably transformed the idea from a critical or revolutionary agenda to one of participatory democratic reform and a rights-oriented set of demands for housing and other social needs.<sup>15</sup>

The right to the city is first the right to the city center, a privileged place.<sup>16</sup> The city center in Lefebvre’s conceptualization functions as a commons, a place for social and economic interaction, for encountering human differences, and for combating spatial and social exclusion or marginalization.<sup>17</sup> The right to the city is not the same as the right to live in the city, but the first implies the second, since Lefebvre grounds the right to participate in being a resident of the city. Thus, the right to use the spaces of the city necessarily implies a right to housing, a right necessarily in contradiction to antecedent property rights.

The second key element is that the right to the city privileges use value over exchange (market) value, i.e. it disfavors absentee ownership, speculation, and opposes the center as place of encoun-

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11. HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* (Donald Nicholson-Smith trans. 1991).

12. For an excellent summary of Lefebvre’s conception and the international right to the city movement inspired by it, see Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT’L L. 435 (2006).

13. *Id.* at 440-45.

14. See generally LEFEBVRE, *supra* note 11.

15. Marcelo Lopes de Souza, *Which right to Which City? In Defense of Political Strategic Clarity*, 2 Interface 315 (2010), available at <http://housingstruggles.wordpress.com/2010/06/06/interfacedebating-david-harvey/>. See also Marcelo Lopes de Souza, *The Brazilian way of conquering the ‘right to the city’: successes and obstacles in the long stride towards an ‘urban reform,’* 147 DISP 25 (2001), available at [www.nsl.ethz.ch/index.php/en/content/download/386/2471/file/](http://www.nsl.ethz.ch/index.php/en/content/download/386/2471/file/).

16. LEFEBVRE, *supra* note 10, at 34.

17. *Id.* at 158-59.

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ter to the center as place of consumption.<sup>18</sup> For residential space, it would clearly imply a right to remain in one's home without regard to market forces driving out lower-income residents, i.e., speculation and gentrification.<sup>19</sup>

While the real-world challenges of restraining the market pricing of land itself and the resulting pressure to remove poor residents from central areas are daunting, a partial realization of the right to the city can occur through non-market pricing schemes for city services. The struggle for the right to the city expresses itself through resistance to market imperatives and demands for social rates. My contention is that these non-market social pricing schemes, sometimes called "social rates" or "social tariffs," exist widely in the United States and Brazil, although the dominant market ideology of the U.S. prevents any open acknowledgment of the practice. Social pricing of the city is nevertheless a key necessary condition to the sustainable inclusion of the poor and working class in urban life.

The third evolved meaning of the right to the city is a democratic right of decision making. City residents must be the makers of the city's structures and spaces, as they quite literally are in Rio's *favelas*, but residents must also be active participants in urban planning, as exemplified by Porto Alegre's pioneering use of participatory budgeting.<sup>20</sup> With regard to the pricing of city services, this clearly implies both a right of city residents to decide social rate policies without interference from other levels of government, and a necessity of full public participation in rate decisions of both public and privatized city service providers like water and sanitation companies.

The right to housing, conceived as part of the right to the city, necessarily requires state action to counteract market forces, if it is to be inclusionary. To have decent housing, poor city residents must be protected from eviction and have access to basic city services including at a bare minimum police protection, transport, water, and sanitation.<sup>21</sup> These services, ordinarily funded through property taxes and service rates or fees, can serve as an exclusionary force if they are not affordable to the poor. Any urban program

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18. *Id.* at 100-02, 109, 123-24, 126-20, 131-32, 170.

19. *Id.* at 41-42 (Kofman & Lebes introduction).

20. Boaventura de Sousa Santos, *Participatory Budgeting in Porto Alegre: Towards a Redistributive Democracy*, 26 *POLITICS & SOCIETY* 461 (1998).

21. Alison Brown & Annali Kristiansen, *Urban Policies and the Right to the City: Rights, Responsibilities and Citizenship* (2009), <http://unesdoc.unesco.org/images/0017/001780/178090e.pdf>.

that takes the right to the city seriously must tackle not only the inevitable market pressures that drive home prices and rents out of the reach of the poor, but also the explicit price of the city, in the form of taxes and utility rates.

In Brazil, the idea of the right to the city translated into legal terms has meant primarily the right to housing and the right to political participation in city planning.<sup>22</sup> Brazil's 1988 Constitution and its 2001 City Statute<sup>23</sup> explicitly adopt the concept of a right to the city.<sup>24</sup> The Constitution provides:

The urban development policy carried out by the municipal government . . . is aimed at ordaining the full development of the social functions of the city and ensuring the well-being of its inhabitants. . . . Urban property performs its social function when it meets the fundamental requirements for the ordainment of the city as set forth in the master plan.<sup>25</sup>

The 1988 Constitution embodies Brazil's transition from the military dictatorship of the 1960s and 1970s to a democratic state.<sup>26</sup> While the idea that property has a social function is not new,<sup>27</sup> the 1988 Constitution follows a trend in late twentieth-century international constitutionalism, incorporating social and economic rights in its catalog of fundamental human rights.<sup>28</sup> On the other hand, the 1988 Brazilian Constitution exists within the context of Latin American constitutional traditions, in which sweeping declarations of human rights and limits on government are evaded if not entirely ignored, and constitutions are rewritten with every regime change.<sup>29</sup>

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22. Edesio Fernandes, *Constructing the Right to the City in Brazil*, 16 SOCIAL & LEGAL STUDIES 201, 211 (2007).

23. Federal Law no. 10.257 (Brazil July 10, 2001)(hereinafter "City Statute").

24. Anna Plyushteva, *The Right To The City and the Struggles Over Public Citizenship: Exploring the Links*, THE URBAN REINVENTORS ONLINE JOURNAL, (March 2009); Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 GEOJOURNAL 99 (2002).

25. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 182 (Braz. 1988).

26. See CHARLES D. COLE, COMPARATIVE CONSTITUTIONAL LAW: BRAZIL AND THE UNITED STATES 30-32 (2008).

27. Sheila Foster and Daniel Bonilla, *The Social Function of Property: A Comparative Law Perspective*, 80 FORDHAM L. REV. 101 (2011); Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089 (2011).

28. E.g. Brazilian Constitution Article 6, guaranteeing rights to education, health, work, housing, and assistance to the destitute, among others. [reprinted in Cole *supra* note 266, at 515].

29. See Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEXAS INT'L L.J. 1, 27-30 (2006).

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The constitutional provisions nevertheless represent a striking example of the adoption of the idea, also expressed in the proposed World Charter of the Right to the City.<sup>30</sup> The 1988 Constitution reaffirms the right to private property,<sup>31</sup> but simultaneously requires that property should fulfill its social and environmental functions.<sup>32</sup> In one concrete expression of the right to the city, the Constitution provides for reassignment of property rights to residential occupants of small city lots through an accelerated five-year adverse possession of private land scheme (*usucapião*), or through assignment of use rights to public land.<sup>33</sup> The 2001 City Statute makes specific provision for measures to prevent speculation, including progressive taxation increases and eventual expropriation of land left vacant.<sup>34</sup> The Statute provides for the means to obtain freehold ownership by adverse possession after five years,<sup>35</sup> but also authorizes other possible forms of property transfer and tenure, including adverse possession for collective ownership (*usucapião especial urbano coletivo*).<sup>36</sup>

The ideals of the Brazilian Constitution and City Statute, while animating a redirection in urban policy and a number of important initiatives, are far from displacing traditional conceptions of property and land use favoring elites and speculators. Likewise, the question of how the exclusion and segregation of the poor and working class residents in Rio and other Brazilian cities is to be addressed requires attention to the action of market forces on many levels, not the least of which is the question of a social price for city services.

### III. SOCIAL PRICE OF PROPERTY TAX AND WATER AND ENERGY RATES IN BRAZIL'S INFORMAL SETTLEMENTS

Throughout Latin America urbanization in the twentieth century has been driven in significant part by informal land occupation and construction by poor and working class citizens, who face the complete inability of either the private housing market or gov-

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30. Fernandes, *supra* note 22, at 201-211; Brown & Kristiansen, *supra* note 21.

31. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, ¶ XXII (Braz.).

32. *Id.* at art. 5, ¶ XXIII.

33. *Id.* at art. 182.

34. Law no. 10.257, de 10 de julio de 2001, D.J.U. de 2002 [hereinafter City Statute], Art. 7, 8.

35. City Statute, Art. 9.

36. City Statute, Art. 10-14; Rose Compans, *A Regularização Fundiária de Favelas no Estado do Rio de Janeiro*, *Revista Rio de Janeiro*, no. 9, 41, 50-51 (jan./abr. 2003.)

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ernments to provide adequate housing and living space.<sup>37</sup> In Rio de Janeiro in 2000, more than one million people, or about 19% of the population, lived in informal settlements, i.e. *favelas*.<sup>38</sup> If illegal subdivisions built by developers are included, some estimates put the number of urban residents throughout Brazil relying on informal housing processes as high as 50%.<sup>39</sup> One could argue that occupants of informal settlements are struggling for Lefebvre's right to the city in the most concrete fashion, occupying and developing urban spaces to meet their needs for access to housing, education, employment and human progress.

Prior to the 1980s the Brazilian legal and political response to *favelas* was largely to ignore them or to eradicate them.<sup>40</sup> In the 1980s the government of Rio de Janeiro began providing water and other services to the *favelas*.<sup>41</sup> Since the 1980s, and particularly after the enactment of the 2001 City Statute, Rio and other Brazilian cities have devoted considerable resources to the provision of municipal services, legalization of property titles, and broader incorporation of *favelas* (as well as other irregular developments) into the city.<sup>42</sup> The Favela Bairro program launched in 1993 by the Rio municipal government, with funding from the Inter-American Development Bank, sought to incorporate the *favelas* into the city with extension of infrastructure and public spaces and the regularization of property ownership.<sup>43</sup> However, the resources devoted to the task have fallen fall short of the need,

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37. Martim O. Smolka & Adriana de A. Larangeira, *Informality and Poverty in Latin American Urban Policies*, in *THE NEW GLOBAL FRONTIER: URBANIZATION, POVERTY AND ENVIRONMENT IN THE 21ST CENTURY* 99-114 (George Martine, et. al. eds. 2008).

38. Energy Sector Management Assistance Program (ESMAP) Brazil, *How do the Peri-Urban Poor Meet their Energy Needs: a Case Study of Caju Shantytown, Rio de Janeiro* 16 (2006) avail. at <http://vle.worldbank.org/bnpp/files/TF027963ESMA09406BrazilStudyForWeb.pdf>.

39. Fernandes, *supra* note 22.

40. Oliveira, *supra* note 3, at 75; Fabio Soares & Yuri Soares, *The Socio-Economic Impact of Favela-Bairro: What do the Data Say?* (IADB Working Paper August 2005), <http://ideas.repec.org/p/idb/ovewps/0805.html>.

41. Soares & Soares, *supra* note 40, at 4.

42. Fernandes, *supra* note 22; Ministerio das Cidades (Brazil Ministry of Cities), *Regularizac?ao Fundi?ria Urbana No Brasil* (Urban Land Regularization in Brazil) (2009) (summarizing efforts to legalize titles and provides services in informal settlements).

43. Sonia Rabello de Castro, *Favela Bairro: A Brief Institutional Analysis of the Programmme and its Land Aspects*, in *HOLDING THEIR GROUND: SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES* (Alain Durand-Lasserve & Lauren Royston, ed. 2002).

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and the continuing growth of the settlements.<sup>44</sup> In theory, municipalities should recover some costs of providing infrastructure and doing the legal work necessary for securing housing tenure, by collecting increased property taxes as a result of the added value created by these improvements. The extremely slow process of land titling in practice has limited the extent to which informal settlements have been incorporated into the property tax and water ratepaying base.<sup>45</sup>

Nevertheless, the prospect of urban integration and land titling inevitably threatens poor residents with market-driven displacement resulting from the combination of property tax payments, utility rates and upward pressure on housing prices and rents.<sup>46</sup> In one Rio settlement, the granting of freehold titles caused home prices to double.<sup>47</sup>

Several legal tools allow Brazilian cities to maintain some control over property price increases resulting from titling of informal settlements, thus allowing low-income residents to be somewhat protected from excessive property taxes. Municipal zoning can designate special areas of social interest (“AEISs”) to prevent the purchase and sale of private land occupied by improvised housing.<sup>48</sup> This zoning designation by its very nature prevents the development of a private market for the purchase and sale of the affected areas, particularly for speculative purposes.

Brazilian municipalities can also make use of a form of leasehold of public land that does not grant full freehold title. Known as a Concession of the Real Right to Use (CRRU), these are usually long-term contracts for occupancy, that can be inherited, but require continued residency and restrict resale.<sup>49</sup> In some cases, *inter vivos* sales are prohibited, and in other cities resales require

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44. *Id.*; Soares & Soares, *supra* note 40.

45. Fernandes, *supra* note 2, at 31-34 (2011).

46. Alain Durand-Lasserve, *Market-driven Evictions and Displacements: Implications for the Perpetuation of Informal Settlements in Developing Cities*, in *INFORMAL SETTLEMENTS: A PERPETUAL CHALLENGE?* (M. Huchzermeyer & A. Karam, ed. 2006).

47. ENERGY SECTOR MANAGEMENT ASSISTANCE PROGRAM (ESMAP), HOW DO THE PERI-URBAN POOR MEET THEIR ENERGY NEEDS: A CASE STUDY OF CAJU SHANTYTOWN, RIO DE JANEIRO 23, (World Energy Council 2006), <http://vle.worldbank.org/bnpp/files/TF027963ESMA09406BrazilStudyForWeb.pdf>

48. Adriana Larangeira, *La Gestion de la Informalidad en Rio de Janeiro y Brazil*, CUADERNO URBANO 187, 208-09 (June 2006); Edesio Fernandes, *Combining Tenure Policies, Urban Planning and City Management in Brazil*, in *LAND, RIGHTS & INNOVATION* 209, 216-17 (Geoffrey Payne, ed. 2002).

49. Fernandes, *supra* note 48, at 215.

approval by local authorities.<sup>50</sup> Sometimes CRRU tenants are required to pay property tax while in other cities they are exempt. In one AEIS where titling has occurred using the CRRU form of tenure, a market exists but land prices—and hence taxes—have remained low. Thus, the CRRU represents an alternative form of property rights that could, theoretically, reduce exclusion by holding down the price of the city. On the other hand, *favela* residents may not be satisfied with the restricted title that the CRRU represents. In Recife a *favela* community known as Brasilia Teimosa resisted offers of legalization via CRRU titles and organized to demand full freehold ownership.<sup>51</sup>

Some empirical indication of the price of the Brazilian city comes from the Instituto Brasileiro de Geografia e Estatística's 2002-2003 survey of consumer expenditures.<sup>52</sup> The median urban household was found to spend R\$573 on housing, including R\$266 for rent and R\$152, or about US\$90, for services and taxes.<sup>53</sup> The amounts spent for city taxes and services loom large for the majority of residents in informal settlements. About half of *favela* residents earn less than the monthly minimum wage (about R\$450 monthly or US\$265), and about a quarter earns less than half the minimum.<sup>54</sup> For poor urban residents, services and taxes could amount to half of their monthly income or more.

By 2004, 86% of *favela* residents considered themselves homeowners, but virtually none had legal title.<sup>55</sup> In 1969 only one-third of residents in Rio's *favelas* and housing projects had running water, while by 2001 access to running water was nearly universal.<sup>56</sup> Similarly in 1969 fewer than one-half of households had electricity of any kind, and most electricity was illegally resold by community organizations. In 2001 electricity service was also nearly universal. The electric utility company (Light) was privatized in 1996, and chose to treat *favela* residents as customers

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50. *Id.*

51. *Id.* at 225.

52. INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE), CONSUMER EXPENDITURE SURVEY POF 2002-2003 (2003), Tabela 4.3 - Despesas monetária e não-monetária média mensal familiar da área urbana. <http://www.ibge.gov.br/english/estatistica/populacao/condicaodevida/pof/2002/default.shtm>.

53. *Id.*

54. ESMAP, *supra* note 47.

55. Janice Perlman, *Marginality: From Myth to Reality in the Favelas of Rio de Janeiro, 1969-2002*, in URBAN INFORMALITY IN AN ERA OF LIBERALIZATION: A TRANSNATIONAL PERSPECTIVE, at 28 (Ananya Roy and Nezar AlSayyad, ed. 2004).

56. *Id.*

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rather than outlaws.<sup>57</sup>

Titling and legalization of informal settlements, while clearly distinct processes,<sup>58</sup> simultaneously offer new stability and new risks.<sup>59</sup> With legalization comes the obligation to pay for city services that poor residents previously did without or, alternatively, obtained without payment. With incorporation into the legal city, and especially with titling, comes the requirement to pay local property and business taxes as well as utility payments, in some cases driving residents out of their homes.<sup>60</sup>

*Favela* residents, or at least, resident organizations, have expressed a strong desire to obtain freehold titles to their homes. In Rio, payment of the property tax (IPTU, for *impuesto sobre a propiedad predial e territorial urbana*) is dependent on title regularization, and for that reason poor residents profess a strong desire to pay their property tax.<sup>61</sup> With an IPTU bill comes recognition as a “*gente*”, a citizen and not a slum-dweller. On the other hand, like any property tax, IPTU is only related to income to the extent that land values are related to income. Particularly in informal settlements bordering on high-value neighborhoods, the possibility that tax assessments, and therefore IPTU bills, will make housing unaffordable is very real.

Rio de Janeiro’s IPTU legislation provides exemptions for the physically disabled, World War II veterans, and elderly persons above sixty years of age earning up to two minimum salaries, a level considerably above the poverty line.<sup>62</sup> There is also a provisional exemption related to titling of informal settlements. That exemption is temporary, only from the time parcels in irregular or

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57. *Id.* at 42, n. 60.

58. Nora Aristizabal & Andres Ortiz Gomez. *Are Services More Important than Titles in Bogota?* in LAND, RIGHTS AND INNOVATION: IMPROVING TENURE SECURITY FOR THE URBAN POOR (G. Payne, ed. 2002).

59. Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 ST. LOUIS U. L. J. 761 (2005-06); see Gonzalez, *supra* note 6.

60. MIKE DAVIS, PLANET OF SLUMS 80-81 (2006); see Fernandes, *supra* note 48.

61. Erico Costa, Interview with Joze Candido de Lacerda, VITRUVIUS MAGAZINE, July 2004, <http://www.vitruvius.com.br/revistas/read/entrevista/05.019/3326>; see Gonzalez, *supra* note 6, at 245 (being billed for taxes and utilities is relied on by residents without title as a sign of tenure security).

62. Prefecture of Rio de Janeiro. Código Tributário Do Município Do Rio De Janeiro Seção II, Art. 61. Das Isenções, Cartilha dos Impostos Municipais: IPTU - Imposto sobre a Propriedade Predial e Territorial Urbana (Tax Code of Municipality of Rio De Janeiro, Section II Article 61 Exemptions from Municipal Taxes ) (accessed 1/4/2011), <http://www2.rio.rj.gov.br/smf/pagsmf/conteudo.cfm?template=conteudo&idmenu=3&idsubitem=128+&procura=IPTU++Imposto+sobre+a+Propriedade+Predial+e+Territorial+Urbana>.

illegal settlements are registered with the local government agency until the property and subdivision are approved, and only for acquirers of for low-income persons in designated sections of Rio, occupying the land as a family residence and not owning or purchasing any other property.<sup>63</sup> Other Brazilian cities have provided one-year exemptions from property taxes for newly titled informal settlements.<sup>64</sup> After any initial exemption period, IPTU is assessed based on property value. While other measures, including AEIS zoning and less-than-freehold titling, might restrain the value and hence the amount of the IPTU, the limited exemptions mean that low-income property owners are not explicitly protected from unaffordable taxes.

Social tariffs are widely practiced by Brazilian electric utilities, and have also existed for some time for water and sewer rates.<sup>65</sup> Social prices for utility rates, i.e. reduced rates for low-income customers have been adopted by electric utilities in order to reduce illegal usage and resale.<sup>66</sup> In Rio the public water and sewer utility, CEDAE, has established social rates, i.e., reduced rates based on income for more than one million customers, in recognition of the fact that a paying customer—even one paying below cost rates—is better than the alternative, residents appropriating water from the network without payment, or paying high costs to informal water suppliers.<sup>67</sup> However, the social water rate is based on the questionable assumption that poor households will consume less water than average, and its benefits are restricted to customers using less than 200 liters per day. Nor is the CEDAE discount rate limited to the poor; households with incomes of up to five times the minimum salary are eligible.<sup>68</sup>

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63. *Id.*

64. Ministerio das Cidades (Brazil Ministry of Cities), *Regularizac?ao Fundiária Urbana No Brasil (Urban Land Regularization in Brazil)* 68, 93 (2009).

65. Carlos Eduardo Lima Passos, *Consumo de água e tarifa social em áreas de baixa renda: Estudo de caso das Comunidades de Santa Marta, Complexo do Borel / Casa Branca e Complexo da Mangueira, Rio de Janeiro 95* (unpublished dissertation State University of Rio de Janeiro 2010) <http://www.peamb.eng.uerj.br/producao.php?id=268>; Luisa M. Mimmi & Spencer Ecer, *An Econometric Study of Illegal Electricity Connections in the Urban Favelas of Belo Horizonte, Brazil* 38 *ENERGY POLICY* 5081 (2010); see Gonzalez, *supra* note 6, at 247 (describing social rates for taxes and utilities in Bogota Colombia).

66. Bruno de Wachter & Clothilde Wattel, *Safe electricity for slum residents A pilot project in Paraisópolis, São Paulo, Brazil* (2007) [http://www.leonardo-energy.org/webfm\\_send/399](http://www.leonardo-energy.org/webfm_send/399).

67. CEDAE, *Balanco Social Anual 2010*, [www.cedae.com.br/div/Balancos/BalancoSocial2010.pdf](http://www.cedae.com.br/div/Balancos/BalancoSocial2010.pdf).

68. Federação de Favelas Do Rio De Janeiro (FAFERJ), *Baixa Renda-Saiba Mais*.

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Many other examples could be cited. While some measures exist to align IPTU and utility rates with ability to pay, Brazil does not yet seem to have a comprehensive social tax and rate system, intentionally calibrated to secure housing tenure for the poorest residents of informal settlements. Nor do these partial measures seem grounded in a constitutional theory of the right to the city. Instead, ad hoc social pricing schemes exist within the dominant market pricing structure, in which land tax is based on the exchange value of real estate and utility rates are based on marginal cost plus profit.<sup>69</sup>

## IV. SOCIAL RATES IN U.S. CITIES

The idea of a right to the city in today's United States might seem more than a little odd. Unlike the city of Europe and Latin America, for many older U.S. cities, the center is not the locus of speculation, competition and high economic demand for land or housing. Instead, industrial jobs and middle class families have been decentralized to the suburbs, leaving the poor to occupy the older housing of the jobless city centers.<sup>70</sup> Lefebvre's notion that the struggle for the city is a defining one seems culturally irrelevant to the economic and political geography of the U.S. Lefebvre himself recognized that "in the United States, the urban core hardly exists."<sup>71</sup>

On the other hand, U.S. cities have certainly witnessed political struggles over gentrification and displacement of the poor.<sup>72</sup> The Occupy Wall Street movement of 2011 consisted of physical encampments by protesters in city centers, spreading from downtown Manhattan to hundreds of other cities.<sup>73</sup> This movement struggled literally for the right to city space in order to confront the wealthy and powerful,<sup>74</sup> the "New Masters" in Lefebvre's "cen-

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(Blog post April 14, 2008) <http://faferj.blogspot.com/2008/04/baixa-renda-saiba-mias.html>.

69. See Ioannis N. Kessides, *Reforming Infrastructure: Privatization, Regulation and Competition* 269-274 (World Bank Policy Research Report) 28985 (2004).

70. See Anthony Downs, *How American Cities are Growing*, 16 *BROOKINGS REV.* 8 (1998); PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS AND THE AMERICAN CITY* (1997).

71. LEFEBVRE, *supra* note 10, at 125.

72. Chester Hartman, *The Right to Stay Put*, in *GENTRIFICATION READER* (Loretta Lees, Tom Slater & Elvin Wyly, ed. 2010).

73. Neal Caren & Sarah Gaby, *Occupy Online: Facebook and the Spread of Occupy Wall Street* (2011). Available at SSRN: <http://ssrn.com/abstract=1943168>.

74. Alasdair S. Roberts, *Containing the Outrage: How Police Power Tames the*

tres of decision.”<sup>75</sup>

There is no equivalent to the right to the city (or the social function of property) in United States constitutional law. Judicial elaboration of a social right to housing remains highly controversial, and vigorously contested by advocates of the neoliberal conception of negative rights and untrammelled markets as the providers of human wants and needs.<sup>76</sup> Nor has legislation sought to protect poor urban residents from displacement by market forces, apart from some legal mandates to prevent or remedy racial segregation and exclusion in housing, and thus implicitly granting some rights of urban access for racial minorities, but not for low-income residents *per se*.<sup>77</sup> The right to the city movement has a presence in the United States, in the form of the Right to the City Alliance, growing largely out of anti-globalization struggles of various grass-roots groups.<sup>78</sup> Their activism has been directed at gentrification, preservation of public housing threatened with demolition, and police activity excluding the poor and homeless from urban centers.<sup>79</sup> While the right to the city movement, as such, has not produced national legal recognition equivalent to Brazil’s City statute, nevertheless a variety of laws and practices echo the demands of a broader movement against exclusion.

In U.S. practice, a variety of subsidies and concessions exist that tend to preserve some affordability of cities, albeit for the most part benefitting homeowners rather than renters. These ad hoc social pricing devices exist in considerable conflict with the prevailing neoliberal theories of taxing and pricing.

### A. *City Real Estate Taxes*

The predominant theoretical view of local government taxation in the United States regards the local property tax as a price

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*Occupy Movement* BOSTON REVIEW (on-line only 2011), available at SSRN: <http://ssrn.com/abstract=1959542>.

75. LEFEBVRE, *supra* note 10, at 161.

76. Mark Tushnet, *Social Welfare and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2003); Peter Salins, *Comment on Chester Hartman’s “The Case for a Right to Housing”: Housing Is a Right? Wrong!*, 9 HOUSING POLICY DEBATE 259 (1998).

77. Fair Housing Act of 1968, 42 U.S.C. § 3601; Housing and Community Development Act 1974, 42 U.S.C. § 5309; see *Kennedy v. City of Zanesville Ohio*, 505 F.Supp. 2d 456 (S.D. Ohio 2007) (involving local government’s failure to supply water service to African-American neighborhood challenged under civil rights laws).

78. Harmony Goldberg, *Building Power in the City: Reflections on the Emergence of the Right to the City Alliance and the National Domestic Worker’s Alliance* (2008), <http://inthemiddleofthewhirlwind.wordpress.com/building-power-in-the-city>.

79. *Id.*

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for the public goods and services provided by local governments. The objective of taxation, according to this view, is to set a tax level sufficient to pay the cost of the “optimal” quantity and quality of government services, with the taxpayer understood as consumers of those services.<sup>80</sup> In this abstracted neoclassical economics model, citizens are imagined as rational optimizers who choose where they live by seeking the highest level of services they desire (education, police protection, transportation, etc.) combined with the lowest tax rates.<sup>81</sup> This conception, known as the Tiebout model of local taxation, assumes away all problems of income inequality, or at least fails to consider them, and is completely indifferent to any notion of urban identity, cultural attachment or social dynamics in the creation and composition of the city.<sup>82</sup> In a nation divided by race and class, the Tiebout sorting of citizens based on local taxation levels has produced segregation such that the affluent can enjoy both high levels of service and low tax rates.<sup>83</sup>

Competing with the market price theory of local taxation, so to speak, is the view that taxation generally, and municipal taxation in particular, should be based on ability to pay.<sup>84</sup> In U.S. tax policy discussions there is a continuing and lively debate between advocates of so-called “benefits taxation,” i.e., the Tiebout approach that taxes according to benefits received to mimic market pricing, and advocates of progressive taxation based on either ability to pay or equalizing sacrifice.<sup>85</sup> The ability to pay approach

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80. William A. Fischel, *Municipal Corporations, Homeowners and the Benefit View of the Property Tax*, in PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE (Wallace Oates, ed. 2001); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

81. *Id.*

82. See Richard Voith, Central City Decline, Regional or Neighborhood Solutions, BUSINESS REVIEW (March-April 1996), <http://www.phil.frb.org/research-and-data/publications/business-review/1996/march-april/center-city.cfm>; see also Carl Davis et al., Who Pays? A Distributional Analysis of the Tax Systems in All 50 States, at 9-10 (3rd Edition 2009), [www.itepnet.org/whopays3.pdf](http://www.itepnet.org/whopays3.pdf).

83. Voith, *supra* note 82; Swanstrom, et. al., PULLING APART, ECONOMIC SEGREGATION AMONG SUBURBS AND CENTRAL CITIES IN MAJOR METROPOLITAN AREAS (Brookings Institute 2004), [http://www.brookings.edu/reports/2004/10metropolitan\\_policy\\_swanstrom.aspx](http://www.brookings.edu/reports/2004/10metropolitan_policy_swanstrom.aspx).

84. See generally Marjorie Kornhauser, *Equality, Liberty and a Fair Income Tax*, 23 FORDHAM URBAN L. J. 607, 615-20 (1995); Alfred G. Buehler, *Ability to Pay*, 1. N.Y.U. TAX L. REV. 243 (1946); M. Slade Kendrick, *The Ability-to-Pay Theory of Taxation*, 29 AM. ECON. REV. 92 (1939) (arguing against the ability to pay theory).

85. See Richard A. Musgrave, *Progressive Taxation, Equity and Tax Design*, in TAX PROGRESSIVITY AND INCOME INEQUALITY (Joel Slemrod ed., 1994).

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sometimes is dictated by facts on the ground, i.e., that ignoring income differences could lead to nonpayment and tax revolts.

Americans living in central cities spent an average of \$1,305 annually for property taxes in 2008, with an average annual income of \$55,385.<sup>86</sup> The average annual water bill was \$455 and the average annual electric bill was \$1,169.<sup>87</sup> For those with incomes below the U.S. minimum wage, roughly \$15,000 per annum, the average annual property tax for homeowners ranged from \$424 to \$727, with water bills ranging from \$239 to \$325 and electricity from \$824 to \$1104 annually.<sup>88</sup> A full-time minimum wage worker thus spent roughly 4% of income on property taxes, 2% for water bills and 7% for electricity. While these averages suggest affordability is not a major concern, the national averages mask wide variations, and the urban poor in more expensive coastal cities, including New York, Washington D.C. and Los Angeles, face much higher costs, which can result in very real economic displacement pressure.<sup>89</sup>

Income-based property tax reduction programs exist in some form in most U.S. states and in the District of Columbia.<sup>90</sup> Most of these were adopted in the 1960s and 1970s in response to rapid inflation in home prices, combined with assessment reform that ended the practice whereby local government tax officials set taxable property values at a fraction of real market value.<sup>91</sup> These two developments led to significant and unexpected increases in property tax bills, which in turn sparked social protests.<sup>92</sup> The protests were mostly by middle class and more affluent property owners. Indeed, fractional assessment practices eliminated by assessment reform had tended to benefit the middle class and disfavor the poor and racial minorities in cities, because the latter paid higher

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86. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURE SURVEY, TABLE 7 (2009), available at <ftp://ftp.bls.gov/pub/special.requests/ce/standard/2009/tenure.txt>.

87. *Id.*

88. *Id.*

89. See FURMAN CENTER, DISTRIBUTION OF THE BURDEN OF NEW YORK CITY'S PROPERTY TAX, 2011, [http://furmancenter.org/files/publications/Distribution\\_of\\_the\\_Burden\\_of\\_New\\_York\\_City\\_Property\\_Tax\\_11.pdf](http://furmancenter.org/files/publications/Distribution_of_the_Burden_of_New_York_City_Property_Tax_11.pdf) (noting unequal incidence of New York City property taxes on poor renters); Micah Lemons, *Note: Circuit Breakers: Implementing a Property Tax Credit to Help Low-Income Households*, 19 GEO. J. POVERTY LAW & POL'Y 111 (2012).

90. Steven D. Gold, *Circuit Breakers and Other Relief Measures*, in THE PROPERTY TAX AND LOCAL FINANCE (C. Lowell Harriss ed., 2006); GLENN W. FISHER, THE WORST TAX? A HISTORY OF THE PROPERTY TAX IN AMERICA, 193-94 (1996).

91. ISAAC WILLIAM MARTIN, THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS 50-57 (2008).

92. *Id.*; Steven D. Gold, *supra* note 90, at 150-52.

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effective property tax rates, and would have benefitted from assessment reform.<sup>93</sup> So-called circuit breakers, i.e., rebates of local property taxes from state revenues targeted at low-income homeowners, were the response from the political left, while across the board tax caps like California's Proposition 13 were the response from the right.<sup>94</sup>

In most states, however, the social rates or rebate programs are offered only to the elderly poor, or to other preferred groups among the poor, such as veterans or the disabled. As of 2008, 33 states provided income-based property tax reduction, but only 12 states plus the District of Columbia offer property tax relief to non-elderly poor.<sup>95</sup> Thus, when we talk about social rates for property taxes in the U.S., these rates are often available only for the elderly, and in some cases disabled, excluding working-age, poor families. Income-based property tax reduction programs are sometimes called "circuit breakers," although this term does not have a generally accepted definition.<sup>96</sup> I will continue to refer to income-based rebate programs, or social property tax rates.

Social property tax rate programs vary in their design and delivery.<sup>97</sup> They do not target cities exclusively or particularly, although higher property values in cities mean that city residents are more likely to benefit from them. Some states establish a simple percentage-of-income threshold, such as 5%. They then either cap property taxes at that level or provide a rebate payment or income tax credit for property tax payments exceeding the threshold percentage.<sup>98</sup> Other states provide multiple income percentage thresholds, increasing progressively with income. Some states also exclude taxpayers above a maximum income, which can be quite low, often at or near the poverty level in some states. Another common variant is to make rebate payments based on

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93. GEORGE E. PETERSON, ET. AL., *PROPERTY TAXES, HOUSING AND THE CITIES* (1973) (study finding that real estate tax assessment practices resulted in cross-subsidies from poor and minority owners and renters to middle class suburbanites and calling for assessment reform).

94. MARTIN, *supra* note 91, at 88-93.

95. JOHN H. BOWMAN, DAPHNE A. KENYON, ADAM LANGLEY, & BETHANY P. PAQUIN, *PROPERTY TAX CIRCUIT BREAKERS: FAIR AND COST-EFFECTIVE RELIEF FOR TAXPAYERS* (Lincoln Institute of Land Policy 2009), available at [https://www.lincolninst.edu/pubs/dl/1569\\_838\\_Property%20Tax%20Circuit%20Breakers%20Final.pdf](https://www.lincolninst.edu/pubs/dl/1569_838_Property%20Tax%20Circuit%20Breakers%20Final.pdf).

96. See Gold, *supra* note 90.

97. NATIONAL CONSUMER LAW CENTER, *FORECLOSURES* (2009 supplement); KAREN LYONS, SARAH FARKAS, & NICHOLAS JOHNSON, *THE PROPERTY TAX CIRCUIT BREAKER: AN INTRODUCTION AND SURVEY OF CURRENT PROGRAMS* (Center on Budget and Policy Priorities 2007).

98. LYONS ET. AL., *supra* note 97.

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income, without regard to the property tax burden. For example, Iowa refunds 85% of property taxes paid to families earning less than \$10,000 annual income, and 35% of property taxes paid for those earning less than \$15,000.<sup>99</sup> A few states limit property taxes as a percentage of the home value, regardless of income, a system that cannot really be included in the concept of social rates.<sup>100</sup>

Local governments collect property taxes, but the social rebate programs are administered and funded, with rare exceptions, by the states.<sup>101</sup> Thus, these programs either redistribute tax burdens from state-level income or sales taxes, or they result in cross-subsidies from more affluent property tax payers to poor or elderly property owners. In some states, there are many eligible property owners who do not receive the rebates, because the rebate procedure is separate from the property tax collection process, and requires filing separate forms or claiming the rebate on a state income tax return; consequently, many eligible taxpayers fail to file the forms.<sup>102</sup>

The political origin of these social property tax rebate programs is relatively obvious. They are extremely popular with state legislators and voters. Elderly homeowners on fixed incomes often have sufficient political clout to persuade state lawmakers that their property taxes, or the rate of increase in their taxes, are unfair. Moreover, they are consistent with a neoliberal market-based approach that regards property taxes as a form of price for city services,<sup>103</sup> set without regard to ability to pay, with a separate and distinct transfer payment, allowing the liberal state to fulfill its part via a limited redistribution of income.

U.S. social property tax rebates are not motivated by any recognition of a right to the city for poor residents. Indeed, they have been criticized for their failure to target the truly needy and their redistribution in favor of middle class seniors.<sup>104</sup> Nevertheless, some cities have recognized that in addition to state-administered tax rebate programs, the cities themselves must also address the reality of unaffordable property taxes for their low-income residents. The problem is especially salient for cities grappling

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99. *Id.*

100. *Id.*

101. See BOWMAN ET AL., *supra* note 95; see also LYONS ET AL., *supra* note 97.

102. See BOWMAN ET AL., *supra* note 95.

103. See *supra* notes 80-84 and accompanying text.

104. Robert C. Christopherson, *Missing The Forest For The Trees: The Illusory Half-Policy Of Senior Citizen Property Tax Relief*, 13 ELDER L. J. 195 (2005).

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with the problem of large uncollected delinquent property taxes.<sup>105</sup> While some of these unpaid taxes are attributable to well-off scofflaws or speculators, often property tax delinquencies result directly from the poverty of the homeowners, who are simply unable to meet their tax payment obligations.<sup>106</sup> Cities have responded, in some instances, with ad hoc programs to adjust property tax delinquencies, or allow extended repayment, based on social need. Chicago, for example, has a discretionary program to abate property tax debts based on financial hardship.<sup>107</sup> Philadelphia and other cities similarly offer discretionary tax forgiveness and payment plans for poor residents.<sup>108</sup>

Several cities, including Philadelphia, have sold delinquent property tax claims to private collection firms at a discount, in order to close municipal budget gaps.<sup>109</sup> Because the private collectors are motivated solely by the goal of maximizing collections, they are unlikely to be concerned about homeowners' income or ability to pay. In some cases, cities have had to negotiate protections for low-income residents to prevent home losses and displacement as a result of unaffordable property tax rates for the poor. This was the experience in Philadelphia, where the city sought to prevent displacement of poor homeowners by retaining the right to repurchase tax debts on individual homes when necessary.<sup>110</sup>

### B. Social Rates for Water and Energy Services

Neoliberal orthodoxy holds that all users of basic city services such as water, sewer, solid waste removal, electricity and other energy utilities should pay a market price in order to make these

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105. Patrick Kerkstra, *Special Report: The Delinquency Crisis*, PLANPHILLY, Aug. 13, 2011, <http://planphilly.com/special-report-delinquency-crisis>; Patrick Kerkstra, *City's Tax Delinquency Epidemic Deepens*, PLANPHILLY, June 9, 2012, <http://planphilly.com/citys-tax-delinquency-epidemic-deepens>.

106. See PAUL WALDHART & ANDREW RESCHOVSKY, PROPERTY TAX DELINQUENCY AND THE NUMBER OF PAYMENT INSTALLMENTS 11, 14 (2012) (finding that property tax delinquencies may result from income constraints, and that billing for taxes more frequently than once per year increases tax collections).

107. City of Chicago, Financial Hardship Application (2011), [http://www.cityofchicago.org/city/en/depts/rev/provdrs/tax/svcs/apply\\_for\\_financialhardship.html](http://www.cityofchicago.org/city/en/depts/rev/provdrs/tax/svcs/apply_for_financialhardship.html).

108. News Release, City of Philadelphia (2011), available at <https://work.phila.gov/philagov/news/prelease.asp?id=227>; City of Washington, D.C. (2011), <http://otr.cfo.dc.gov/otr/cwp/view,a,1329,q,621148.asp>; City of Indianapolis, [http://www.indy.gov/eGov/Mayor/Executive/Pages/2003\\_1.aspx](http://www.indy.gov/eGov/Mayor/Executive/Pages/2003_1.aspx).

109. Ben Hayllar, *Philadelphia's Tax Lien Sale and Securitization*, 13 GOV. FIN. REV. (1997).

110. *Id.*

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services economically viable and efficient, and to conserve resources by discouraging overconsumption.<sup>111</sup> United States public utility law directly incorporates this market logic, and calls for price structures to be based on marginal cost.<sup>112</sup> For electric utilities, Federal law, namely the Public Utility Regulatory Policies Act of 1978 (“PURPA”), mandates cost-based pricing for all classes of customers.<sup>113</sup> On the other hand, PURPA requires electric utilities to determine whether to establish so-called “lifeline” rates, i.e., rates that may be lower than those based on costs alone in order to meet “essential needs” of customers.<sup>114</sup> Thus even Congress simultaneously enacts market price into law but allows a space for social price.

The market pricing of energy even in the U.S. is relatively recent. From 1938 until 1989, for example, the Federal Power Commission and its successor the Federal Energy Regulatory Commission regulated the price of natural gas.<sup>115</sup> Deregulation of gas prices took place in the historical moment when deregulation generally was on the ascendancy, with concomitant deregulation of airlines, banking, and other market sectors previously regarded as utilities.<sup>116</sup> In response to the price increases that followed deregulation, Congress enacted the Low Income Home Energy Assistance Program (LIHEAP) to protect low-income consumers from price increases with transfer payments to subsidize energy purchases and to encourage weatherization and other energy-saving measures for low-income households.<sup>117</sup>

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111. POVERTY IN FOCUS, EQUITABLE ACCESS TO BASIC UTILITIES: PUBLIC VERSUS PRIVATE PROVISION AND BEYOND (Degol Hailu & Raquel Tsukada, eds. 2009), <http://www.ipc-undp.org/pub/IPCPovertyInFocus18.pdf>; Karen Bakker, *Neoliberalizing Nature: Market Environmentalism in Water Supply in England and Wales*, 95 ANNALS OF THE ASSOC. OF AM. GEOGRAPHERS 542 (2005); WORLD BANK REFORMING INFRASTRUCTURE: PRIVATIZATION, REGULATION, AND COMPETITION (2004).

112. CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE 389-98 (1984).

113. 16 U.S.C. §1621(d)(1) provides:

Rates charged by any electric utility for providing electric service to each class of electric consumers shall be designed, to the maximum extent practicable, to reflect the costs of providing electric service to such class, as determined under section 2625 (a) of this title.

114. 16 U.S.C. §1624.

115. Elizabeth Moler et. al., *A Salute: 75 Years for the FPC and FERC*, 16 ENERGY L.J. 293, 294-96 (1995).

116. MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985).

117. JULIE WHITTAKER & LIBBY PERL, LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM (LIHEAP) ALLOCATION RATES: LEGISLATIVE HISTORY AND CURRENT LAW (Congressional Research Service 2006), [http://assets.opencrs.com/rpts/RL33275\\_20060210.pdf](http://assets.opencrs.com/rpts/RL33275_20060210.pdf).

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Water and sewer companies in the U.S., on the other hand, are often still owned and operated by municipal governments, in contrast with the widespread privatization of water service in the developing world. The cost of water and sewer service rose rapidly in the 1980s and 1990s, partly as a result of environmental requirements.<sup>118</sup> For the very poor and for residents whose income is irregular, water rates can become unaffordable, and members of these groups may face the threat of service termination or even property seizure because of unpaid bills.<sup>119</sup>

Lifeline rates for water service tend to be ad hoc and vary widely from city to city, although they are typically aimed at delinquent ratepayers, as an alternative to service termination. A minority of U.S. cities and water utilities offer social rates or subsidy payments for poor customers.<sup>120</sup> Baltimore, Maryland, for example, offers a \$125 credit and flexible repayment for low-income property owners who have receive notice of a service shut-off or property seizure.<sup>121</sup> Some cities, like San Antonio, Texas,<sup>122</sup> San Francisco, California,<sup>123</sup> and Columbus, Ohio,<sup>124</sup> offer discounted rates for the poor. Other cities, including Houston, Texas, offer financial assistance to pay water rates from privately donated funds.<sup>125</sup> The Philadelphia Water Department offers one of the more comprehensive social rate programs, combining a percentage-of-income payment plan for customers in arrears with an annual grant of \$200, which is an explicit transfer payment from other rate collections.<sup>126</sup> California authorizes private water companies to provide rate relief for poor customers and a number of

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118. See Water Infrastructure Network, *Safe and Clean Water for the 21st Century*, at 3-5 (2000), <http://www.win-water.org/reports/winreport2000.pdf> (citing rising percentage of families who face unaffordable water bills).

119. NATIONAL CONSUMER LAW CENTER, *ACCESS TO UTILITY SERVICE* 301 (4th ed. 2008).

120. *Id.* at 220-36, 302-04.

121. CITY OF BALTIMORE, *LOW INCOME WATER ASSISTANCE PROGRAM* (2011), <http://www.baltimorecity.gov/Government/AgenciesDepartments/PublicWorks/LowIncomeWaterAssistanceProgram.aspx>

122. CITY OF SAN ANTONIO, *RESIDENTIAL METER DISCOUNTS* (2011), <http://www.saws.org/service/rates/resMeterDiscount.shtml>.

123. CITY OF SAN FRANCISCO, *SAN FRANCISCO WATER DISCOUNT PROGRAMS* (2011), <http://www.sfgov.org/site/frame.asp?u=http://www.sfwater.org/>.

124. CITY OF COLUMBUS, *COLUMBUS, OHIO LOW-INCOME UTILITY PROGRAMS* (2011), <http://utilities.columbus.gov/water/pdfs/LowIncome6-29-07.pdf>.

125. CITY OF HOUSTON, *WATER FUND* (2011), <http://www.publicworks.houstontx.gov/resource/waterfund.html>.

126. News Release, City of Philadelphia, <https://ework.phila.gov/philagov/news/prelease.asp?id=227>; see also National Consumer Law Center, *supra* note 119, at 302.

them have established reduced rates based on income.<sup>127</sup>

When North American water and energy utility companies and regulators have sought to establish social rates for the poor through administrative action, market advocates have occasionally gone to the courts to object. A considerable amount of litigation has been brought challenging the legitimacy and legality of social rate schemes.<sup>128</sup> While property rights theories are advanced to oppose the appropriation of urban land to house the poor, opponents of social pricing mobilize theories of nondiscrimination (state utility regulation statutes typically call for rates to be nondiscriminatory),<sup>129</sup> implicitly treating market (or monopoly) pricing as the only natural and equitable basis to charge for water, energy and other utility services.

In *Mountain States Legal Foundation v. Utah Public Service Commission*,<sup>130</sup> and other similar cases,<sup>131</sup> courts have found that establishing different prices for utility service based on income or ability to pay violates broadly stated principles of equality or non-discrimination. Relying on the principle that similarly situated persons may not be charged dissimilar rates, these courts find that differences in ability to pay are not an appropriate basis for charging different rates. These decisions are imbued with the neoliberal law-and-economics belief in the efficiency of market pricing and the desirability of relegating income and wealth redistribution to income transfer programs.

On the other hand, other courts have upheld social rate programs against legal challenges,<sup>132</sup> and income-based rates funded by utilities, sometimes using explicit surcharges to other customers, are relatively common.<sup>133</sup> Although utilities adopt social rates partly for pragmatic reasons of reducing collection costs and write-offs of uncollected arrearages,<sup>134</sup> they are at least implicitly acknowledging the contradiction between universal service and cost-based pricing.

United States law is devoid of any recognition of a right to the

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127. National Consumer Law Center, *supra* note 119, at 303.

128. Michael A. Rosenhouse, *Public Utilities: Validity of Preferential Rates for Elderly or Low-income Persons*, 29 A.L.R. 615 (1988).

129. See Ind. Code §8-1-2-103 (1993).

130. 613 P. 2d 92 (N.M. 1984).

131. See, e.g., *Mountain States Legal Found. v. Pub. Util. Comm'n*, 590 P.2d 495 (Colo. 1979).

132. See Rosenhouse, *supra* note 128.

133. See Ken Costello, *Criteria for Determining the Effectiveness of Utility-Initiated Energy Assistance*, 23 ELECTRICITY J. 35 (2010).

134. *Id.* at 43.

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city, or any positive right to housing, and social rates are not enacted on the basis of rights arguments. In many cases measures to consider repayment ability result from episodic political mobilization around rate hikes or displacement, combined with pragmatic concerns of municipal authorities anxious to preserve the legitimacy of tax and rate collections and keep unpaid bills to a reasonable level, and avoid the external costs of service terminations and evictions. Principles of universality of utility service and consideration of ability to pay in local taxation also play a role. Nevertheless, the wide variety of arrangements in the United States and its cities to account for the payment ability of taxpayers and rate-payers reveal some of the same contradictions that are expressed in social pricing elsewhere, and in the demand for the right to the city.

## V. CONCLUSION

The concept of the right to the city is foreign to United States jurisprudence; likewise, the notion of social pricing is deeply contrary to the liberal market-driven economic consensus. Nevertheless, the practices of states and municipalities do reveal the manner in which the struggle between market price and social price has played out, perhaps in response to episodic and partial political mobilizations. Social pricing exists, although its theoretical basis is poorly elaborated. In Brazil, the new Constitutional and legislative norms embodying the right to the city have found expression in efforts to break down the exclusion and isolation of *favelas* and other informal settlements, albeit perhaps simply as a new extension of the sovereignty of the capitalist state. If the market cycle of speculation and displacement is not to be repeated in these self-created urban spaces, the right to the city for all must necessarily imply the legitimacy of the demand for a social price.

